

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR BENEFICIAL WATER USE PERMIT       )  
NO. 12826-G76LJ BY RIDGEWOOD       )

FINAL ORDER

\* \* \* \* \*

On October 6, 1987 the Proposal for Decision in this matter was entered. The Proposal recommended that Application for Beneficial Water Use Permit No. 12826-g76LJ be granted in an amount of 35 gallons per minute up to 56.46 acre-feet of water per year for domestic use. Objector William H. Bush filed exceptions to the Proposal and requested that oral arguments be held, pursuant to MCA 2-4-621(1). An Oral Argument Hearing was held before the Assistant Administrator of the Water Resources Division on February 23, 1988 at the Kalispell Water Rights Bureau Field Office. Present at the Hearing were Dean Jellison, attorney, and Ron Linnell and Rex Bollen on behalf of the Applicant, and Objectors William Bush and Esther Hoag.

The Proposal for Decision recommended that Application for Beneficial Water Use Permit No. 12826-g76LJ be granted, although in amounts less than requested in the Application. At Oral Argument William Bush, on his own behalf and on behalf of several of the other Objectors, urged that the Application be denied. Mr. Bush also offered several written statements from neighboring well owners documenting their well problems. Because these statements constitute new evidence, they were not considered in making the final decision in this matter.

Mr. Bush takes exception to the Hearing Examiner's conclusions that there are unappropriated waters in the source of supply and that the water rights of prior appropriators will not be adversely affected by the application as granted. See, Conclusion of Law 6 and 7, Proposal at pp. 13, 14. He provided a detailed statement of his exceptions, which essentially assign three points of error to the Proposal.

First, Mr. Bush calls attention to evidence in the record concerning well and water availability problems experienced by neighbors of the Ridgewood project dating from about the time the Ridgewood well in question was installed. He argues that the occurrence of those problems cannot be coincidental, but must be a result of Ridgewood's pumping. I find this argument unpersuasive. The Department conducted a pump test of the Ridgewood well while monitoring the water levels of the Objectors' wells. See, Department Report of March 3, 1986. As stated in the March 3 Report, none of the Objectors' wells showed any apparent response to 20 hours of continuous discharge from the Applicant's well. Based upon the Report, the Hearing Examiner found no significant hydrologic connection between the fracture system that feeds the Applicant's well and that feeding the Objectors' wells, at least when the Applicant's well is pumped at the tested rate. Finding of Fact No. 7, Proposal at p. 14.

The Findings of Fact of the Hearing Examiner can not be modified at this stage unless:

the agency first determines from a review of the complete record ... that the findings were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

MCA 2-4-621(3). This is equivalent to the "clearly erroneous" standard, that is: the Examiner's Findings can be reversed only if they are clearly erroneous. See, Billings v. Billings Firefighters Local No. 521, 200 Mont. 421 (1982). I cannot find that the Examiner's reliance on the pump test results was clearly erroneous. To the contrary, the pump test was the only "hard" data on record concerning the interconnectedness of the Applicant's and Objectors' wells.

Second, Mr. Bush argues that the pump test was invalid because it was performed in winter, when water demand is lower. As stated in his exceptions, "One does not test aquifer capacity/connectivity during no-load conditions, when the neighbor well failures occur during active use periods". Exceptions of October 18, 1987 at p. 1. This argument is without merit. A winter test pumping will show a connection between the aquifers if one exists, even though the magnitude of the effect may be less. Moreover, as the Hearing Examiner noted, a summer test pumping would have registered interference effects from other well users, making the test data unusable. Thus, I find no invalidity in the pump test in this matter.

Mr. Bush also challenges the credentials of William Osborne, a water well driller who testified on behalf of the Applicant, and asks that Mr. Osborne's testimony be stricken. Striking the

testimony is not proper at this stage, since assessing the credibility of witnesses is a matter within the Hearing Examiner's discretion. At any rate, I note that the Hearing Examiner relied more on the Department's own witness and pump test results than on the testimony of Mr. Osborne.

One final matter needs to be addressed. The Hearing Examiner approved Permit No. 12826-g76LJ in the amount of 35 gallons per minute (gpm) up to 56.46 acre-feet per year (ac-ft/yr), because the Department's pump test reasonably indicates that these amounts can be appropriated without adversely affecting other water users. Because the Applicant's water system is also served by Certificate of Water Right No. 10517-g76K, the Examiner allowed the Permit and the Certificate to be used together so long as the combined appropriation did not exceed the Certificate amount of 50 gpm and 80 ac-ft/yr.

However, I find that allowing the Applicant to conjoin the Permit and Certificate appropriations is improper. The Permit can only authorize those amounts shown to have no adverse effect by the pump test. Although we cannot restrict the Certificate in this Permit proceeding, the permit can be restricted by allowing it to be used only when the Certificate is not being used. Accordingly, I will modify Proposed Condition A to require that the Permit and Certificate be used alternately. In any case, this appears to be how the Applicant's water system is actually operated. See, Finding of Fact 6, Proposal at pp. 5-6.



Accordingly, all the Findings of Fact and Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and records herein and the Exceptions and Oral Argument Hearing, the Department of Natural Resources and Conservation makes the following:

#### ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 12826-g76LJ is hereby granted to Ridgewood to appropriate 35 gallons per minute up to 56.46 acre-feet of water per year for domestic uses.

The point of diversion for this Permit is a groundwater well located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North, Range 19 West, with the water to be diverted by means of a pump for domestic uses in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North, Range 19 West, Lake County, Montana. The period of use is January 1 through December 31, inclusive, of each year. The priority date for this Permit shall be 9:45 a.m., May 16, 1977.

This Permit is subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit may not be used in conjunction with Certificate of Water Right No. 10517-g76K. Instead, the Permit and Certificate shall be used alternately.

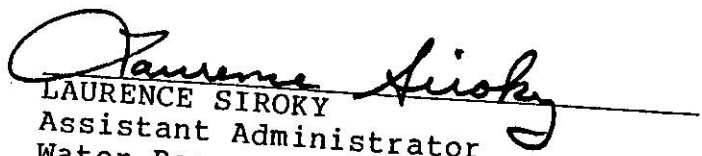
B. The water right evidenced by this Permit is subject to all prior and existing water rights, and to any final determination of existing water rights as provided by Montana.

C. The Permittee shall install a flow meter, and shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to this Permit. These records shall be made available to the Department upon request.

D. This Permit is subject to MCA § 85-2-505, which requires that all wells be constructed so that they will not allow water to be wasted or contaminate other water supplies or sources, and which requires that all flowing wells be capped or equipped so that the flow of water may be stopped when it is not being put to beneficial use.

E. Nothing in this Permit shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

DATED this 18 day of August, 1988.

  
LAURENCE SIROKY  
Assistant Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, MT 59620-2301

NOTICE

The Department's Final Order may be appealed in accordance with §2-4-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 22nd day of August, 1988, as follows:

Ridgwood  
Ron Linnell, Representative  
Box 1004  
Big Fork, MT 59911

William and Clarice Bush  
Jubilee Orchards  
Sylvan Drive  
Big Fork, MT

Mark Shapley  
Hydrogeologist  
1520 East Sixth Avenue  
Helena, MT 59620-2301  
(hand delivered)

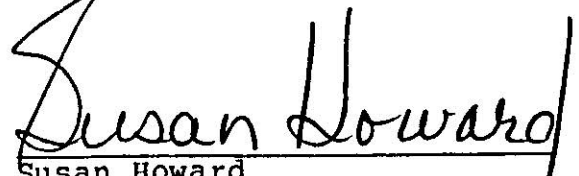
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Legal Counsel  
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M. Dean Jellison  
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Big Fork, MT 59911

Gertrude Chamberlain  
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324 South Main  
Lusk, WY 82225

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Kalispell Field Manager  
P O Box 860  
Kalispell, MT 59903  
(inter-departmental mail)

  
Susan Howard  
Hearing Reporter

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 12826-G76LJ BY RIDGEWOOD )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 25, 1986, and was reconvened on September 22, 1986.

Ridgewood, the Applicant in this matter, appeared by and through counsel Dean Jellison.

Ron Linnell, manager of Ridgewood, appeared as a witness for Applicant.

William Osborne, a well-drilling contractor with Liberty Drilling, appeared as a witness for the Applicant at the September 22, 1986 portion of the hearing.

Objector Beryle Dunn appeared at the hearing in person, and as representative for Nelbardine Dunn.

Objector William Bush appeared at the hearing in person, and as representative for Clarice Bush at the August 25, 1986 portion of the hearing. Clarice Bush appeared in person at the September 22, 1986 portion of the hearing. Mr. Bush additionally alleged that he represented the interests of area residents Joseph Yates, Esther Hogue, and James Stevenson.

James Stevenson, area resident, appeared at the September 22, 1986 portion of this hearing.

Mark Shapley, Hydrogeologist with the Department of Natural Resources and Conservation (hereafter, the "Department"), appeared as staff expert witness for the Department.

Charles Brasen, Field Manager of the Kalispell Water Right Bureau Field Office, appeared as a witness for the Department.

#### EXHIBITS

The Applicant offered two exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 is a photocopy of a plat map of Sterling Estates, the subdivision which is now known as Ridgewood. The map was marked at the hearing with the location of "Well 1" (for which the present Application has been made) and a second well.

Applicant's Exhibit 2 consists of three photocopied pages of test data from a 24-hour pump test done on the well for which the Application has been made.

Applicant's Exhibit 1 and 2 were accepted into the record without objection.

The Objectors offered one exhibit for inclusion in the record in this matter:

Objector's Exhibit 1, prepared by William Bush, is a two-page list of the Objectors' disagreements with Department correspondence and with the January, 1986 hydrogeology report which had been sent to all parties of record.

Objectors' Exhibit 1 was accepted into the record without objection.

Counsel for the Applicant moved that the Department file, which contains the originals of the Application and Objections, correspondence between the Department and the parties, and all reports and processing done by Department personnel, and which was made available at the hearing for review by all parties, be made part of the record in this matter. No party made objection to any part of the file. Therefore the Department file in this matter is included in the record in its entirety.

The Department offered one additional exhibit for inclusion in the record in this matter:

Department Exhibit 1 consists of copies of letters which the Kalispell Water Right Bureau Field Office sent to the parties in this matter, suggesting possible settlement of the objections on the basis of the hydrogeology report and proposed permit criteria, and of the originals of the parties replies.

Department Exhibit 1 was accepted into the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. Section 85-2-302 MCA (1985) states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." "Person" is defined by §85-2-102(11) MCA (1985) to include such entities as the Ridgewood subdivision. The exceptions to permit requirements listed in §85-2-306 do not apply in the present matter. Therefore, the Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. Application for Beneficial Water Use Permit No. 12826-g76LJ was duly filed with the Department of Natural Resources and Conservation on May 16, 1977 at 9:48 a.m.

3. The pertinent portions of the Application were published in the Daily InterLake, a newspaper of general circulation in the area of the source, on December 14, 21, and 28, 1977.

4. The source of water for the proposed appropriation is groundwater.

5. The Applicant requests a permit for 75 gallons per minute up to 114 acre-feet of water per year, from a groundwater well which was drilled in 1978, and which is being used to provide domestic water to the subdivision of Ridgewood. The requested permit, in conjunction with Certificate No. 10517-g76K issued on another well, is intended to provide for the future water needs of the subdivision as well as for the present uses. The proposed period of use is January 1 through December 31 of each year.

The Ridgewood subdivision (formerly Sterling Estates) has been platted for 76 residences. Forty-two lots had been sold, and seven houses constructed, at the time of the hearing in this matter. The remaining lots may be sold within the next five years, if yearly sales remain steady, but the projected date for full use of water is the year 2001. (Ron Linnell, Dean Jellison.)

6. The Applicant holds Certificate No. 10517-g76K, which allows appropriation of 50 gallons per minute ("gpm") up to 80 acre-feet of water per year for domestic use in the subdivision, with a priority date of November 22, 1976. This well has a restrictor which limits the rate of withdrawal to 25 gpm: the well was drilled through highly-fractured rock which is drawn into the screen and the pump if the well is pumped at a higher rate. (Ron Linnell, William Osborne.) This (older) well is pumped only when the well for which the present application has been made cannot operate, or when a minimum level is reached in the storage tank which is fed by the newer well. (Ron Linnell.)



The well for which the present application has been made, located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North, Range 19 West, Lake County, Montana, feeds water into a storage tank of approximately 50,000 gallon capacity. Another pump pressurizes the water lines and delivers the water to the houses. There is no flow measurement device on the well at the present time. (Ron Linnell.)

The present system, with only one well operating at a time, is sufficient to meet the present needs of the subdivision. (Ron Linnell.)

7. The Applicant is projecting a water requirement of more than 100 gpm to service the subdivision. In order to obtain this flow rate, the Applicant's intent is to combine the 50 gpm flow rate granted to it in Certificate of Water Right No. 10517-g76K with the 75 gpm requested in the present application. (Ron Linnell, Dean Jellison.)

However, test pumping done by Liberty Drilling in 1982 indicates that the newer well will not stabilize at a pumped rate of more than 35 gpm. (Applicant's Exhibit 1.) The calculations made by Mark Shapley during the January 1986 hydrogeology test indicate that the well system delivers about 35 gpm when the water is close to static water level, with the flow decreasing to 25 gpm after continuous pumping draws the water level down to 160' to 170' below ground surface. Over a period of slightly more than 20 hours, the well averaged a discharge of 27 gpm. (Mark Shapley.)

The original Application in this matter requests a permit only for the existing well which is under discussion. However, if the necessary flow cannot be obtained from the two wells, the Applicant wishes to be able to drill an additional well or wells to achieve the flow rate authorized by the permit in this matter. (Dean Jellison.) In addition, the Applicant wants to be able to obtain the full requested volume of 114 acre-feet per year, in addition to the 80 acre-feet of volume already granted by Certificate for the other Ridgewood well (Dean Jellison), although Department standards of 1.5 acre-feet per year per household for domestic use indicate that the total domestic requirement of Ridgewood would be only 114 acre-feet per year. (Testimony of Charles Brasen.)

8. Applicant's witness William Osborne testified that he believes, on the basis of his more than 30 years of well drilling experience in the Flathead Lake area, that the Applicant's and Objectors' wells tap a fractured bedrock aquifer which contains a "vast amount" of water. This water appears to be cycled through the aquifer system very slowly, based on analysis which indicates that water from the aquifer has been in storage 8,000 to 27,000 years. Mr. Osborne stated that he does not believe that the area where the parties are located will experience a lowering of the water table, due to the large volume of water which is available in the aquifer. He stated that he has not experienced any problem with lack of recharge to wells drilled in the bedrock system.

Mark Shapley testified that the age of the water indicates slow movement of water and low rates of recharge in the fractured bedrock system, meaning that water availability is dependent on the water already stored in the system. Therefore, the important factor in terms of water availability in the area is "fracture geometry", that is, the location and size of the water-yielding fractures at any given site will determine the amount of water which can be obtained. He and Mr. Osborne agreed that the aquifer appears to be composed of discontinuous, loosely-connected fracture systems, with well depths dependent on the depth at which productive fractures are encountered, and yields depending on the storage capacity of the specific fracture system.

Mr. Shapley testified that he believes Mr. Osborne's testimony that there is a large amount of water available for appropriation to be misleading, since much of the water is not available to wells due to depth or geology, or is available only at very small withdrawal rates because of limitations of storage and transmissivity of the fractures themselves. He stated that the fracture system up on the plateau at Ridgewood shares some limited hydrologic interchange with the fracture system down by the lakeshore where the Objectors are located, whether through well-defined fracture systems, which his testing indicates is not the case (see March 3, 1986 Report by Mark Shapley), or through less defined fracture systems or intergranular transport through the bedrock. Therefore, there is some chance that any given well

in the area may affect the availability of water for other area wells. The problem is that there is not enough information to be able to determine water availability limitations.

9. The Objectors allege that the Applicant's use of water has adversely affected their water rights by lowering their wells and reducing the amount of flow available. Their testimony indicates that they are experiencing water supply difficulties.

Objector William Bush testified that the residents of the area immediately around Ridgewood have been experiencing well problems since 1978, when the applied-for well was drilled and put into production. He testified that he has had well problems, including a pump failure in June or July of 1985, at which time a neighbor was also experiencing a well failure, and alleged that other neighbors have had loss of flow during recent years. (See Objectors' Exhibit 1.) Mr. Bush testified that it is his belief that the aquifer underlying the area is limited and fragile, and that the Applicant's water use has caused the water problems experienced by the Objectors. He stated that the problems appear to be localized, and therefore probably are not caused by other development in the Big Fork area.

Objector Beryle Dunn testified that the static water level in his well started dropping in 1979 and has failed to recover fully, and that the water availability has been reduced from 15 gpm to 5 gpm. He stated that he did not experience any problems until the Applicant drilled wells and put them into production. The Applicant's wells are located approximately one-quarter of a mile from the Dunns' well.

William Osborne testified that, in his experience, nearly all problems encountered with "bedrock wells" are the result of well construction or well condition problems, or because the well has a siting problem in regard to the location of the fractures which conduct water into the well. He stated that changes in flow rates experienced by the Objectors are not likely to be caused by the Applicant pumping in the same aquifer. In response to questioning, he stated that lowering of static water levels in the Objectors' wells also was not likely to be caused by the Applicant's pumping, due to the poorly-defined connections between the fracture system at the Applicant's well site and the system (or systems) at Objectors' well sites.

Mark Shapley testified that the pump testing which he conducted did not result in any observable effects to the Objectors' wells. The test, which involved running 20 + hours of continuous discharge from the Applicant's well through the in-place system (an average 27 gpm flow) and monitoring wells in the area, indicated that the hydrologic connection between the Applicant's and the Objectors' wells is not well-defined. (See Shapley Report.) Therefore, the test yielded no data which suggests that the Objectors' water problems are due to pumping by the Applicant. Mr. Shapley noted that possible reasons for the Objectors' well problems include improper well construction, rock collapse in the aquifer, regional aquifer failure, seasonal fluctuation or drought effects, general development in the geographic area, effects of an uncontrolled flow well in the area, or any of a number of other reasons. Mr. Shapley agreed

that well problems which the Objectors have experienced possibly could be due in part to the Applicant, but pointed out that there is not sufficient data on long-term effects to support such a determination.

Mr. Shapley stated that the testing indicates that the Applicant's pumping does not appear to effect the Objectors' wells over the short term, at the Applicant's present rate of withdrawal. However, the testing does not answer long-term aquifer supply questions as to whether recharge of the fracture system is sufficient to sustain a development the size of the projected subdivision without affecting the Objectors' wells, nor does it indicate what effect withdrawal at the Applicant's proposed flow rate of 75 gpm might have, since the lack of measurable effect at the lower pumping rate resulted in a lack of data base which could be used for calculations.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

#### PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

85-2-311, MCA. Criteria for issuance of permit. (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
  - (i) at times when the water can be put to the use proposed by the applicant,
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water, for domestic purposes, is a beneficial use. See MCA §85-2-102(2)(a).

5. The proposed means of diversion, construction, and operation of the appropriation works are not adequate to obtain the requested flow rate and volume. The evidence shows that the well for which this Application has been made is incapable of producing a sustained yield of more than 35 gpm; over a 20-hour test period, the yield averaged 27 gpm. (See Findings of Fact 6, Applicant's Exhibit 2.)

It is possible that the well could yield the requested flow and volume if it was to be redrilled or drilled deeper. However, the evidence present on this record is not sufficient to allow for a finding that this could be done without adverse effect to other appropriators, since there is no information as to whether or not a deeper well would encounter fractures which are closely connected hydrologically to the Objectors' fracture system source. (See Conclusion of Law 7, below.)

6. The Applicant has provided substantial credible evidence that there are unappropriated waters in the source of supply, and that the water is available throughout the period of appropriation. (See Finding of Fact 8.) However, the Applicant has not provided evidence which indicates that there is water in the source of supply in the amount the Applicant seeks to appropriate. The fractures which the well encounter apparently do not provide water in the quantities the Applicant has requested. (See Finding of Fact 8, testimony of Mark Shapley; March 3, 1986 Report by Mark Shapley.) Therefore, any permit which is issued in this matter must reflect actual water availability, rather than the applied-for amount, in order that



the criteria of MCA §85-2-311 may be met. See MCA §85-2-312 ("The department may issue a permit for less than the amount of water requested . . . subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 . . . ").

The Applicant indicated its intent to drill other wells as necessary to obtain 75 gpm up to 114 acre-feet of water per year, if granted a permit for the present application. However, the information available on the record in this matter does not provide substantial credible evidence that "enhancing" the presently available flow by drilling other wells could be done without adversely affecting the water rights of other appropriators. (See Conclusion of Law 7, below.)

7. There is substantial credible evidence that the use of the Applicant's present water system does not adversely affect the water rights of other appropriators.

The Objectors in this matter testified that they have been experiencing water system difficulties in recent years, since the Applicant's diversion system went into operation. (See Finding of Fact 9.) However, the only data on the record, the pump testing results, does not support a finding that there is any significant hydrologic connection between the fracture system which feeds the Applicant's well and that which feeds the Objectors' wells.

The Objectors allege that the testing should have been done during a period of maximum use. However, such a test situation would have made it impossible to sort out the impact, if any,

caused by the Applicant's withdrawal from the effects of pumping in other wells in the Objectors' own fracture system. The lack of significant connection between the lakeside fracture system and that fracture system which is penetrated by the Applicant's well suggests rather that the Objectors' water system difficulties, which are especially evident during the irrigation season, are linked to a localized drawdown of their own fracture system source.

Although the loose hydrologic connection between the Applicant's and the Objectors' points of diversion makes it unlikely that the Objectors' water difficulties are the result of the Applicant's current pumping regimen, there is some limited connection, and it is possible that a higher pumping rate by the Applicant would affect the Objectors' wells. (See Finding of Fact 9; March 3, 1986 Report by Mark Shapley.) Additionally, any attempt to obtain a higher flow rate by drilling additional wells could result in penetrating fractures which are more closely connected hydrologically with the fracture zone which delivers water to the Objectors' wells than are the fractures penetrated by the present well. Therefore, in the absence of substantial credible evidence that more water than the Applicant is currently diverting can be diverted without adverse effect to other appropriators, the Applicant cannot be granted a permit for the requested 75 gpm up to 114 acre-feet of water per year. However, a permit may be granted for the 35 gpm presently diverted by the well for which the application has been made. See MCA §85-2-312.

8. As discussed above, the record provides substantial credible evidence that the Applicant's present appropriation system will not adversely affect the water rights of other appropriators. The present water system does not divert more than 35 gpm (since the secondary well does not operate at the same time--see Finding of Fact 6), or therefore more than 56.46 acre-feet of water per year (35 gpm x constant use). Limiting the Applicant's appropriation to these flow rates and volumes therefore serves to protect the Objectors, since the record does not provide evidence that any higher flow rate or volume will not cause adverse effect.

The existence of a Certificate of Water Right, granted to the Applicant for the other well serving the Applicant's water system, creates a dilemma. The Certificate allows the Applicant to appropriate 50 gpm up to 80 acre-feet of water per year, amounts already in excess of those limits which have been based on the only existing data. Obviously, to allow the Applicant to divert 35 gpm up to 56.46 acre-feet of water per year in addition to the Certificate amounts could result in adverse effect to the Objectors, since the Applicant did not provide any evidence that more water could be pumped without impact to the Objectors than was test-pumped using the 35 gpm well. However, not allowing the Applicant to pump from this well would work a hardship on the Applicant, since the water system is designed to use this well (see Finding of Fact 6), and since the testing of this well did not cause a discernible impact to the Objectors' wells.

Therefore, any Permit issued in this matter will allow the Applicant to use 35 gpm from this well, but will limit the combined withdrawals from it and the well for which the Certificate has been issued to maximums of 50 gpm and 80 acre-feet per year. (The combined flow rates and volumes cannot be set less, since the Applicant already has been granted a Certificate of Water Right to appropriate these amounts.) However, the Applicant is entitled to use the combined flow rate and volume only to the extent necessary to meet the domestic needs of the subdivision. Modification of the Permit may be made in the future if further development does not take place.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

#### PROPOSED ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 12826-g76LJ is hereby granted to Ridgewood to appropriate 35 gallons per minute up to 56.46 acre-feet of water per year for domestic uses.

The point of diversion for this Permit is a groundwater well located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North, Range 19 West, with the water to be diverted by means of a pump for domestic uses in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 26 North,

Range 19 West, Lake County, Montana. The period of use is January 1 through December 31, inclusive, of each year. The priority date for this Permit shall be 9:45 a.m., May 16, 1977.

This Permit is subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit may be used in conjunction with Certificate of Water Right No. 10517-g76K. However, the combined flow rates may not exceed 50 gallons per minute, nor may the combined volume exceed 80 acre-feet of water per year.

B. The water right evidenced by this Permit is subject to all prior and existing water rights, and to any final determination of existing water rights as provided by Montana.

C. The Permittee shall install a flow meter, and shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to this Permit. These records shall be made available to the Department upon request.

D. This Permit is subject to MCA §85-2-505, which requires that all wells be constructed so that they will not allow water to be wasted or contaminate other water supplies or sources, and which requires that all flowing wells be capped or equipped so that the flow of water may be stopped when it is not being put to beneficial use.

E. Nothing in this Permit shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit nor does the Department, in

issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 6<sup>th</sup> day of October, 1987.

Peggy R. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA            )  
                                  ) ss.  
COUNTY OF LEWIS & CLARK )

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 6, 1987, she deposited in the United States mail, first class postage prepaid, a PROPOSAL FOR DECISION by the Department on the Application for Beneficial Water Use Permit No. 12826-76LJ, by Ridgewood, addressed to each of the following persons or agencies:

Ridgewood  
Ron Linnell, Representative  
Box 1004  
Big Fork, MT 59911

M. Dean Jellison  
Attorney at Law  
Hash, Jellison, O'Brien & Bartlett  
P. O. Box 1178  
Kalispell, MT 59903-1178

William & Clarice Bush  
Jubilee Orchards  
Sylvan Drive  
Big Fork, MT 59911

Ellen Boiteau  
Box 125  
Big Fork, MT 59911

Robert S. Keller  
Attorney at Law  
Box 1954  
Kalispell, MT 59901

Beryle & Nelbardine Dunn  
Box 185  
Big Fork, MT 59911

Gertrude Chamberlain  
Jeanette Ord Sager  
Harry Charles Sager  
324 South Main  
Lusk, Wy 82225

**CASE #** 12826



Chuck Brasen  
Kalispell Field Manager  
Kalispell, MT 59901  
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Susan Howard

STATE OF MONTANA                    )  
  ) ss.  
COUNTY OF LEWIS & CLARK )

On this 6th day of October, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1990

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